

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
HUDSON COUNTY
DOCKET NO. HUD-L-0672-10
A.D. # _____

IN THE MATTER OF
THE PETITION OF:
SLAVA LERNER

TRANSCRIPT
OF
MOTION FOR
RECONSIDERATION

Place: Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

Date: March 19, 2010

B E F O R E:

HONORABLE HECTOR R. VELAZQUEZ, J.S.C.

T R A N S C R I P T O R D E R E D BY:

MICHAEL DE LUCA, 7004 Boulevard East, 28D,
Guttenberg, New Jersey 07093

A P P E A R A N C E S:

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I N D E X
3/19/10

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Court Decision

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(Proceedings begin at 1:48 p.m.)

THE COURT: This is In the Matter of the
Petition of Slava Lerner, Docket No. L-672-10. Your
appearance.

MR. DEUTSCH: Good afternoon, Your Honor, I'm
Dennis Deutsch from the firm of Kaufman, Bern, Deutsch
& Leibman on behalf of the petitioner.

MR. RAVIN: Good afternoon, Richard Ravin,
Hartman & Winnicki, on behalf of movant/respondent,
Michael DeLuca.

THE COURT: All right. Mr. Ravin, this is
your motion for reconsideration. The Court will grant
you the right to have this matter reconsidered. I'm
satisfied, based upon your submissions, that I guess
because this matter was filed a little differently than
many other pleadings are filed, it was not scheduled
for a normal motion calendar, and so we were not aware
that there was a response to this, or that anyone
actually was responding to this motion.

So on that basis, I think that the matter
should be heard on the merits, and so I'm granting your
request for reconsideration.

And your motion, therefore, is that --
actually, no, then it would be your motion at this
juncture to perpetuate this testimony. So I'll hear

you on that issue, Mr. -- Mr. Deutsch.

2 MR. DEUTSCH: Yes, thank you, Your Honor.
3 For the record also I would just like the record to
4 reveal that upon being advised that Mr. DeLuca had
5 counsel, and they wanted to be heard on this, I hope
6 that the record reflects to the Court that I certainly
7 cooperated and consented, recognizing the right of --

8 THE COURT: Yes.

9 MR. DEUTSCH: -- Mr. DeLuca to be -- to be
10 heard on this as well. So there was no obstruction in
11 any way on our part to allow due process to be applied
12 in this case.

13 THE COURT: In fact, I believe it was my
14 staff who told you that we could not adjourn it.

15 MR. DEUTSCH: That's correct.

16 THE COURT: So -- so that's why I did grant
17 the reconsideration.

18 Let me address the -- the underlying
19 application by -- by your client.

20 Mr. Ravin's position appears to be, frankly,
21 that under the cases cited you ought to be required to
22 file a complaint under a John Doe, and then seek this
23 relief at a later date.

24 Now I don't think that the cases cited really
25 require the filing of the complaint, but I think as a

1 practical matter I think that probably is what ought to
2 be done, because all of the cases that I reviewed on
3 this issue have involved cases in which a complaint
4 with John Doe defendants have, in fact, been filed.

5 The rule -- the rule itself, however,
6 requires that you show at least some reason why you
7 could not, in effect, file this complaint. And I guess
8 I need you to address that first. Why is it that you
9 couldn't just simply file this complaint with John Doe
10 defendants and seek your relief post filing?

11 MR. DEUTSCH: I think that we could, Your
12 Honor, to be candid with the Court, but respectfully, I
13 would disagree with your preliminary statement that the
14 rule requires that. I think that the rule gives an
15 option to proceeding in either direction.

16 And I just want to take a moment to explain
17 to the Court why we did take this option because, as
18 Your Honor said, that might have been the practical way
19 to go in hindsight. Part of what we're trying to
20 discover here obviously is the name of the posters.

21 Now Mr. DeLuca may or may not have any
22 information along that line, although there's some
23 indication that he does. What that information is, we
24 don't know. At the very least, it may only be the name
25 or the identification of the ISP, or the Internet

Service Provider.

2 And our thoughts on this was that if that
3 Internet Service Provider is outside the jurisdiction
4 of this Court then there may not be a basis to even
5 file the complaint and we can't proceed. And I would
6 have to advise my client accordingly.

7 Most of the cases cited, as Your Honor will
8 see, and most of the cases along this line, deal with
9 postings, or e-mails where the ISP is Yahoo or another
10 U.S. corporation, which can be brought into either this
11 court or a federal court, and one can obtain
12 jurisdiction over them.

13 Our thoughts were, for all we know, this is
14 an Indian ISP, or someone outside the jurisdiction of
15 this Court.

16 THE COURT: But do we get to those issues
17 though? I mean, don't -- aren't you required
18 preliminarily, pursuant to the rule, to show that --
19 that you have no ability, I guess, to file this
20 complaint in the absence of -- of this information.

21 Because if I -- if I look at the rule itself,
22 and the cases that talk about the rule, and not
23 necessarily this underlying issue of disclosure of --
24 of these anonymous posters, but the rule was, as my
25 reading of the case law, was intended to permit

1 individuals to seek this discovery, this pre-filing
2 discovery in order to protect the evidence, to ensure
3 that evidence is not lost or destroyed.

4 You're seeking to discover names of
5 individuals, these -- these anonymous posters, and I
6 don't think this rule was intended to allow you to do
7 that.

8 MR. DEUTSCH: I understand your position, but
9 I also took into consideration the ethical obligation
10 of an attorney before filing a complaint, to have a
11 reasonable belief that there'd be a basis and ability
12 to proceed in that cause of action.

13 THE COURT: Well, there's actually cases that
14 say you shouldn't use this rule for that purpose, to
15 develop your cause of action.

16 MR. DEUTSCH: No, it's not a matter of
17 developing the cause of action, we haven't discussed
18 the underlying cause of action. I think that's clearly
19 there. The question is whether in good faith, without
20 knowing where the ISP is located, or whether this
21 information and these identities can even be obtained,
22 whether it would be proper to proceed in filing the
23 complaint.

24 Now you may be right and of course it's your
25 call, Judge, as to the interpretation of that rule, but

1 I balance that against the frivolous filing
2 requirements as well. And my concern was simply to
3 file a John Doe without even knowing whether these were
4 identifiable, or whether the ISP, which would provide
5 that information, was within the jurisdiction of the
6 Court, might run afoul of the frivolous litigation
7 rule.

8 Now in hindsight, with counsel coming in,
9 with the Court's inclination, perhaps I'm wrong, but if
10 I am, then I erred on the part of being conservative to
11 avoid any frivolous litigation claims, which I think
12 ethically is my obligation. And that's -- that's why
13 we went that way.

14 I -- a lot of the jurisdiction -- the cases
15 that were cited were in other jurisdictions where there
16 were John Does. Of course we don't know what their
17 rules were, and they aren't cited with respect to pre-
18 filing discovery requests in those jurisdictions.

19 So I -- I respectfully submit that those
20 weren't explained in detail, weren't searched by either
21 side in detail to determine whether there's a
22 equivalent rule in those jurisdictions as well.

23 I think in good faith that this is a
24 procedure that can be used for the purposes of avoiding
25 frivolous litigation, or litigation which can't be

1 proceeded upon in good faith, and that's the way we --
2 why we went this route.

3 Obviously, Your Honor, unless I'm missing
4 something, if you refused -- I shouldn't put it that
5 way. If you grant the current motion to dismiss,
6 obviously my request is, it's without prejudice.

7 THE COURT: Well, I'm not dismissing, I'm
8 denying your request.

9 MR. DEUTSCH: Denying, I understand. But it
10 would be without -- without prejudice I would hope, in
11 terms of filing the way the Court feels would be
12 proper, and then getting us back in the same situation
13 again, so that the -- the direction --

14 THE COURT: Well, let me just --

15 MR. DEUTSCH: I'm sorry.

16 THE COURT: Let me just -- there's a case
17 that I was -- I was reviewing yesterday, Johnson v.
18 Tighe, docket -- docket -- under 365 N.J. Super. 237,
19 this is an Appellate Division case decided in 2003.
20 And it cites to the -- I guess the seminal case on this
21 rule, which is a rule that goes back -- a case that
22 goes back to 1997, Petition of Hall -- By and Through
23 Hall, 147 N.J. 379, that was a Supreme Court case in
24 which the Supreme Court made it pretty clear that there
25 must be a true inability to bring any action at the

1 time the petition is presented.

2 But in -- in the Johnson case the Appellate
3 Division again reiterated that the rule was not
4 intended to authorize pre-suit discovery for the sole
5 purpose of assisting a prospective plaintiff in
6 acquiring fact necessary to frame a complaint. And
7 that's exactly what you're doing. You're -- you're
8 seeking information in order to identify defendants and
9 to frame your complaint, and unfortunately, the rule is
10 not allowing you to do that, and shouldn't be allowed
11 to do that.

12 You still have your remedy post filing.

13 MR. DEUTSCH: May I respond for a moment,
14 Judge?

15 THE COURT: Sure.

16 MR. DEUTSCH: Okay. I would respectfully
17 disagree that we're attempting to use this pre-filed
18 litigation to frame the complaint. The underlying
19 cause of --

20 THE COURT: Well, what would you call it
21 then? You're trying to identify defendants.

22 MR. DEUTSCH: Well, I think that's different
23 than framing the causes of action. I think there's a
24 distinction there. No question we're trying to
25 identify the defendants. The frame of --

1 THE COURT: Well, it says to frame a
2 complaint.

3 MR. DEUTSCH: Well, I'm taking issue,
4 respectfully, with the Court on what's included in
5 that. I interpret that as meaning trying to find
6 whether there's a cause of action or not. We submit
7 that the Dendrite standard has been satisfied in the
8 underlying cause of action, and that simply to identify
9 the proper parties for the complaint is not what that
10 -- as I understand that cases you've just indicated it,
11 Judge, would be applicable to.

12 THE COURT: Mr. Ravin, do you have anything
13 to add?

14 MR. RAVIN: Your Honor, New Jersey sets forth
15 a very straightforward procedure for finding -- for
16 attempting to discover the identities of anonymous
17 posters online, and that is set forth in the Dendrite
18 and its progeny, including Moldow -- Donato v. Moldow
19 and the recent case of A.Z. v. Doe, which the Appellate
20 Division handed down last week.

21 And that case -- in those cases make it clear
22 that the proper procedure for attempting to discover
23 identities of anonymous posters is to file a lawsuit
24 using the fictitious name method.

25 THE COURT: Well, I don't think it says that

1 exactly. I think it --

2 MR. RAVIN: No, it doesn't --

3 THE COURT: -- I think it implies by the very
4 fact that, I guess presumably that's the only way you
5 could do it, but I don't -- I don't think it says, you
6 know, you're required to file a complaint first before
7 you can -- you can use this process and procedure to
8 identify these anonymous posters.

9 Now I don't know which other way you would do
10 it, so I guess in that respect it's kind of intimated I
11 guess in the decision.

12 MR. RAVIN: It -- it's --

13 THE COURT: But -- but when they go through
14 the factors to be considered, they don't say you have
15 to file a complaint with John Does or Jane Does.

16 MR. RAVIN: That's more accurate. I thank
17 you for pointing out that, Your Honor. That is what I
18 meant, that it is a sanctioned procedure at least, it's
19 not -- those courts didn't say you must do it this way.

20 But clearly, the -- as Your Honor has pointed
21 out, Rule 4:11-1 does require extraordinary
22 circumstances for reasons that you cannot file an
23 action, and -- and my point for referencing those cases
24 was that the Appellate Division has noted with approval
25 that process, and so, therefore, but the implication

would be that 4:11-1 is -- is not applicable.

2 I would just like to add, Your Honor, that
3 the petition is not equivalent to the complaint because
4 it doesn't make out the allegations necessary for
5 defamation, which is the test -- which is one of the
6 prongs in the Dendrite standard. The third prong is
7 whether a complaint could be -- could survive a motion
8 to dismiss. And in this case, there is no complaint,
9 number one. And number two, the elements set forth in
10 the petition are lacking.

11 For instance, there's no averment of actual
12 malice, and it's clear that the petitioner is a public
13 figure or a limited public figure, and cases are cited
14 with respect to that.

15 Also, as -- as was the case in Dendrite, the
16 plaintiff there, and the petitioner here, has not set
17 forth a prima facie case for damages, and
18 notwithstanding that there are libel per se alleged,
19 there still is a requirement under the case law, Rocci
20 v. Ecole Secondaire, 165 N.J. 149, to prove some harm.
21 So that -- that element is missing.

22 And then finally, Your Honor, with respect --
23 especially with respect to the posts attributed to the
24 Conman statements, those -- those statements are pure
25 opinion. They're typically -- they're typical name-

1 calling, which was in the context of elections, and
2 that while whatever the Court may decide with respect
3 to the other posters, as to the posters that's
4 attributed to the statement Conman, that's opinion, and
5 that should not be -- and those -- and the identity of
6 that poster should not be lumped together with the
7 other posts.

8 Thank you, Your Honor.

9 THE COURT: All right. Anything else?

10 MR. DEUTSCH: Just very briefly, although I
11 don't know whether it's necessary, having heard the
12 Court thus far, in terms of the underlying claim. I
13 think that a -- although no complaint is attached, I
14 think the underlying causes of action that would be
15 included in a complaint are set forth in great detail
16 in Mr. Lerner's certification, relative to the -- these
17 are allegations of criminal activity. The specific
18 denial that he's never engaged in it, and criminal
19 activity is, in fact, libel, or in this case,
20 potentially slander per se, and that the prima facie
21 case, if you were to reach that issue, certainly is
22 established by the pleadings that have been set forth.

23 THE COURT: I -- I do believe in reading the
24 submissions that were made if I got to that issue, that
25 -- certainly that would satisfy as -- as would the

1 provisions in a complaint that are filed. I think the
2 same allegations that are in those certifications
3 certainly would be part of any complaint filed in this
4 case.

5 The question that I have is do I reach that
6 analysis or do I simply deny your request based upon
7 your failure to show on a good cause to proceed under
8 this rule.

9 All right. I'll have a decision for you by
10 -- by Monday, all right.

11 MR. DEUTSCH: Thank you, Judge.

12 THE COURT: Just give us a call on Monday and
13 I'll let you know what the decision is.

14 MR. RAVIN: One -- one other matter, Your
15 Honor. There's a pending motion for pro hac vice, and
16 I would ask that that be withdrawn at this time without
17 prejudice.

18 THE COURT: All right. I think I spoke to
19 your office. To the extent that I -- if I deny this
20 and a complaint is filed, then I certainly will
21 reconsider my prior decision with respect to that
22 issue.

23 I didn't want to, you know, I didn't think
24 that this motion was so complex that we needed outside
25 counsel to argue that motion. So to the extent that it

1 goes any further from -- from this -- from this motion,
2 then obviously I wouldn't have a problem revisiting
3 that issue at a later time.

4 MR. DEUTSCH: And just for the record, as I
5 think Your Honor knows, I had no -- I filed no
6 objection to the pro hac vice admission.

7 THE COURT: I understand that. That was
8 actually my objection, not anyone else's. I just
9 didn't think it appropriate under the circumstances to
10 have someone fly in from Washington to handle what I
11 considered a rather non-complex situation at this
12 juncture.

13 All right. I'll have a decision to you by
14 Monday. Thank you.

15 MR. DEUTSCH: Thank you.

16 MR. RAVIN: Thank you, Your Honor.

17 (Off the record at 2:07 p.m.)

18 (On the record at 2:19 p.m.)

19 THE CLERK: On the record.

20 THE COURT: All right. Again, this is the
21 Matter of the Petition of Slava Lerner under Docket L-
22 672-10. The respondent, Michael DeLuca, seeks
23 reconsideration of this Court's February 9th, 2010
24 order granting pretrial litigation discovery pursuant
25 to Rule 4:11-1.

1 The Court had previously granted the request
2 to perpetuate testimony and preserve evidence. This
3 motion seeks to set aside that prior order of the Court
4 and seeks to have the Court resolve the application by
5 Lerner on the merits.

6 This case involves a potential defamation
7 claim to be brought by petitioner, Slava Lerner,
8 President of Galaxy Towers in Guttenberg, New Jersey.
9 It is alleged that respondent, Michael DeLuca, and
10 other anonymous individuals posted alleged defamatory
11 statements about Mr. Lerner on the DeLuca website.

12 Respondent DeLuca runs a website called
13 Galaxy Facts, which features a message board used by
14 Galaxy condo owners to discuss a variety of issues
15 confronting their living situations, including its
16 governance and leadership.

17 It appears from the submissions that Mr.
18 Lerner revealed that a recent candidates forum posted
19 on You Tube that he planned to run for reelection to
20 the condo board in the 2010 election. Comments were
21 thereafter posted regarding Mr. Lerner on the website
22 Galaxy Facts. Mr. Lerner claims these comments and
23 statements constitute defamation.

24 The message board can be accessed without any
25 form of registration, and it appears Mr. DeLuca is,

1 therefore, not given access to the names and e-mail
2 address of the individuals posting on the site.

3 However, the identities of these individuals
4 can be discovered via Internet Protocol addresses and
5 the user's Internet Service Providers.

6 On December 24th, 2009 Lerner filed a
7 petition with this Court to obtain such discovery,
8 seeking leave to depose DeLuca to identify the posters
9 -- the anonymous posters who criticized him.

10 Respondent's counsel thereafter contacted Mr.
11 Lerner's counsel and persuaded counsel to withdraw the
12 initial application pursuant to Dendrite v. Doe.

13 Sometime thereafter, however, the petitioner contacted
14 the respondent again, indicating that they intended to
15 re-file the application.

16 Counsel for the parties agreed on a March 5th
17 date. The petition was filed on February 1st with a
18 request for a March 5th return date. The petition was
19 served on DeLuca personally. It was apparently not
20 received until February 16th, 2010.

21 On February 9th, 2010, before respondent had
22 received notice of the petition, this Court entered the
23 order granting the request to request the discovery.
24 It appears that this most likely took place because the
25 petition was processed as a consent order with no

1 complaint having been filed and, therefore, it was not
2 given an official return date.

3 While Lerner agreed to vacate the prior order
4 with an adjourned date of March 5th, this Court did not
5 agree to adjourn the matter and signed -- signed the
6 order uncontested.

7 This application is filed by the defendant --
8 I'm sorry, not defendant, but the respondent asking for
9 reconsideration, and also asking that the petition for
10 pre-litigation discovery should be denied.

11 As previously indicated, the Court has, in
12 fact, agreed to vacate the prior order and has granted
13 the motion for reconsideration, since it appears that
14 the Court entered the order on February 9th before the
15 respondent received proper notice, the Court denied the
16 respondent the proper opportunity to respond to the
17 moving papers.

18 I do believe under the circumstances it would
19 not be appropriate for this Court to deny the motion
20 for reconsideration.

21 With respect to the underlying application
22 for pretrial discovery, the respondent argues that the
23 Appellate Division has determined that the proper way
24 to proceed against alleged defamation committed
25 anonymously on an internet message board is to file a

1 complaint against John Doe defendants and make showings
2 before obtaining any discovery. They also argue that
3 because an aggrieved party like Lerner can sue
4 anonymous speakers even before he knows who they are,
5 pre-complaint discovery is not available.

6 They further argue that even if Lerner may
7 proceed under Rule 4:11-1, his verified petition does
8 not meet the requirements under the Dendrite case to
9 reveal the anonymous posters.

10 This Court has had an opportunity to review
11 the submissions by both parties. It is my belief that
12 I need not address any of the issues regarding whether
13 or not the petitioner has met the Dendrite standards,
14 as I don't believe under the circumstances that pre-
15 complaint discovery is available in this case pursuant
16 to Rule 4:11-1(1).

17 Under 4:11-1 a person who desires to inspect
18 documents or property before an action has been
19 commenced may file a verified petition which must show
20 that the petitioner expects to be a party to an action
21 in a court of this state, but is presently unable to
22 bring it or cause it to be brought. The rule -- this
23 rule must be strictly construed as limited to this very
24 purpose. See Petition v. Hall, as well as -- can we go
25 off the record for a minute?

THE CLERK: Yes.

(Recess from 2:29 to 2:31 p.m.)

THE CLERK: On the record.

THE COURT: Again, see Petition of Hall v.
5 Hall, 147 N.J. 379 and Johnson v. Tighe, 365 N.J.
6 Super. 237.

7 In Petition of Hall v. Hall, the Supreme
8 Court explained that a litigant must not only show that
9 he has a cause of action, but that he's presently
10 unable to commence the action because of some obstacle
11 beyond his control that prevents him from bringing it.

12 In the Johnson case again the Appellate
13 Division found that the rule was not intended to
14 authorize pre-suit discovery for the sole purpose of
15 assisting a prospective plaintiff in acquiring facts
16 necessary to frame a complaint.

17 In the Johnson case, the plaintiffs expressed
18 the purpose in bringing a petition for pre-litigation
19 discovery was to obtain facts necessary to frame her
20 dram shop cause of action, and the court found that
21 that directly contravened the clear limitations
22 articulated by the Supreme Court in Hall.

23 In the case at bar, the plaintiff is not
24 precluded from filing a complaint with John Does. The
25 respondent is correct that in Dendrite v. John Doe, the

1 Donato case -- Donato v. Obernauer (sic) under 374 N.J.
2 Super. 475 our courts have set forth a procedure
3 whereby a party seeking to file a complaint for
4 defamation can sue anonymous speakers even before he or
she knows who they are. And in those circumstances,
pre-complaint discovery would not be appropriate.

7 In this case, it does appear that the
8 petitioner has the ability to file a complaint without
9 knowing the names of the anonymous. Thus, it cannot be
10 said that the petitioner is presently unable to bring a
11 claim as required for the Court's review of pre-action
12 petitions under 4:11-1.

13 For example, in his first petition for pre-
14 litigation, learned a claim that a Galaxy resident
15 named Philip Bergavoy (phonetic) was responsible for at
16 least some of the defamatory statements and served the
17 first pre-litigation petition on this individual.
18 There appears to be no reason why Lerner cannot file
19 the complaint against Bergavoy and any other unknown or
20 anonymous posters, and under the prevailing case law;
21 that is, under Hall, this Court believes that it must
22 do so before seeking the relief for pre-service
23 discovery.

24 Clearly Dendrite and the other cases hold
25 that a plaintiff in Lerner's position can file a

1 complaint without learning the names of the John Doe
2 defendants. Therefore, plaintiff's proffered reason;
3 this is, his inability to identify the potential
4 defendants, does not, in this Court's mind, constitute
5 an adequate showing to justify the grant of a petition
6 for pre-suit discovery pursuant to Rule 4:11-1.

7 And, therefore, this Court will deny the
8 request for pre-suit discovery.

9 Off the record.

10 (Proceedings concluded at 2:36 p.m.)
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CERTIFICATION

I, Patricia A. O'Neill, the assigned transcriber, do hereby certify the foregoing transcript of proceedings at the Hudson County Superior Court, on March 19, 2010, from 1:48:52 to 2:07:46, 2:19:41 to 2:29:15, and 2:31:07 to 2:36:30, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Patricia A. O'Neill (KM)

Patricia A. O'Neill

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AOC Number

KLJ Transcription Service

Agency

3/25/10

Date

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